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DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH
Petitioner,

v.

AARON HEATON
Respondent

Case No.: I-00-40058

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

I. Introduction

By Notice of Infraction served on June 19, 2000, the Government charged Respondent Aaron Heaton with violating D.C. Code § 2-3305.1, which prohibits the unlicensed practice of psychology in the District of Columbia. The Notice of Infraction seeks a fine of \$500.00. Respondent filed a timely plea of Deny, and an evidentiary hearing was held on July 27, 2000. The Government's representative was Sharon Mebane, the investigator who issued the Notice of Infraction. Respondent appeared *pro se*.

At the conclusion of the hearing, it was apparent that several difficult legal issues are presented by this case and that an authoritative statement of the Government's position was necessary in order to decide this case. Accordingly, I ordered the Department of Health to file a

brief addressing those issues, and afforded Respondent an opportunity to reply to that brief. The Department of Health's brief was filed on September 6, 2000.¹ Respondent's time to reply expired on September 25, 2000 with no reply received. The record closed on that date.

Based upon the testimony in the record, my evaluation of the credibility of the witnesses and the documents admitted into evidence, I now make the following findings of fact and conclusions of law.

II. Findings of Fact

Respondent Aaron Heaton holds a master's degree in psychology and currently is a candidate for a doctorate in that field. He is not licensed to practice psychology in the District of Columbia. Since January 1999, Mr. Heaton has been employed as a behavioral specialist by D.C. Family Services, Inc. ("DCFS"), which operates group homes for mentally retarded persons in the District of Columbia.² Mr. Heaton has held various positions providing services to mentally retarded individuals since 1988, although his previous experience has been in facilities outside the District of Columbia. The Government stipulated that Mr. Heaton has the necessary training and experience in both the theory and technique of modifying behavior to qualify as a "behavior management specialist" as defined in 22 DCMR 3599.1, although the Government

¹ The Department of Health is a party to this case, even though its counsel did not enter an appearance before the hearing. The Department's brief (hereinafter "Gov't Br.") is incorrectly captioned as an *amicus* brief.

² Despite its name and the acronym used in this opinion, DCFS is a private corporation and not an agency of the Government of the District of Columbia.

does not concede that such qualifications excuse Mr. Heaton's lack of a license to practice psychology.

To meet its burden of proving that Mr. Heaton engaged in the practice of psychology, the Government relies on two types of evidence. First, it introduced a copy of the contract between Mr. Heaton and DCFS. Petitioner's Exhibit 1 ("PX-1"). The contract specifies that Mr. Heaton is an independent contractor who would provide specified services for up to 42 residents of various group homes operated by DCFS. Those services are:

- Annual assessments and updates as needed;
- Quarterly notes as needed;
- Documenting of behavior data on Psychotropic Med Review Sheets;
- Testing and evaluations as needed;
- Psychotropic IHP [Individual Habilitation Plan] and other meetings as requested by QMRP [Qualified Mental Retardation Professional];
- Inservice trainings as needed;
- Membership on Human Rights Committee;
- Behavior Treatment Plan

PX-1 at 2.

The contract required Mr. Heaton to "work under the auspices of the licensed Psychologist." *Id.* DCFS's licensed psychologist, Dr. Cheryl Bailey, supervised Mr. Heaton's performance under the contract.³

³ Dr. Bailey did not accompany Mr. Heaton on visits that he made to DCFS's group homes, but that does not mean that she did not supervise him. Dr. Bailey and Mr. Heaton met regularly to discuss his work, and Dr. Bailey reviewed and signed all reports that Mr. Heaton wrote.

There is little or no evidence about what Mr. Heaton actually did to satisfy his obligations under some provisions of the contract. For example, there is no evidence about what he did as a member of the Human Rights Committee. Nor is there evidence of his role at meetings. For some of the other obligations, however, the evidence is more substantial. The annual assessments and updates are regular evaluations of the skills, behavior, and functioning of residents of the group homes.⁴ Ms. Mebane testified that Mr. Heaton's quarterly notes in DCFS's records were recommendations for changes in residents' behavior management plans, based upon Mr. Heaton's interpretation of data about the residents that were recorded by direct care staff or others. Mr. Heaton provided no contrary evidence, and I find Ms. Mebane's testimony on that point to be credible. The data collection portion of Mr. Heaton's duties required him to make a record of the behavior of residents that he observed. In performing the testing and evaluations portion of the contract, Mr. Heaton would administer various standard psychological tests and interpret the results. Mr. Heaton testified credibly that he would only administer tests that, in his opinion, he had the necessary training and experience to administer. The Government did not challenge that testimony, nor did it contend that Mr. Heaton necessarily lacked the appropriate educational or professional qualifications to administer the tests. Its position has been that, regardless of his qualifications, Mr. Heaton needed a license to practice psychology to administer the tests.

As described by both Ms. Mebane and Mr. Heaton, the behavior treatment plans called for by the contract, sometimes called behavior management plans or programs, are plans intended to reduce or eliminate an individual resident's maladaptive behavior (*e.g.*, tearing of

⁴ As discussed below, one such evaluation is in evidence as PX-3.

clothing or bedsheets, physical aggression, temper tantrums or running away from the group home). Those plans instruct direct care staff members how to respond to such behaviors. Mr. Heaton regularly prepares such plans, using his knowledge of psychological and behavioral principles. The in-service training that Mr. Heaton conducts pursuant to the contract is related to the behavior management plans that he creates. Ms. Mebane testified that DCFS's training logs show that Mr. Heaton regularly trains direct care staff in the behavior management strategies and techniques described in the plans that he has designed. Although no training logs were introduced into evidence, Mr. Heaton did not dispute that testimony, and I find that Mr. Heaton conducted such training for direct care staff members.

In addition to Mr. Heaton's contract with DCFS, the Government also introduced into evidence a report prepared by Mr. Heaton concerning one of the residents at a group home operated by DCFS. PX-3. That report, entitled "Psychological Evaluation Update," states that the resident "was referred . . . for an updated psychological assessment as a component in the development of his annual Individual Habilitation Plan." *Id.* at 1. In the report, Mr. Heaton summarizes background information as well as behavioral observations and diagnostic impressions previously made by others. Mr. Heaton also evaluated the resident using two psychological assessment scales, the Callier Azusa Scale and the Vineland Behavior Adaptive Scales – Interview Edition. *Id.* at 3. In applying those scales, he relied upon reports from staff members as well as his own observations of the resident in drawing his conclusions. *Id.* Based upon his evaluation, he concluded in the report that the resident's cognitive skills and adaptive skills are within the profound range of mental retardation. *Id.* at 4-5.

Mr. Heaton's report also evaluates the resident's emotional and behavioral functioning, academic and vocational functioning, sensory/motor/perceptual functioning, and communication/language functioning. *Id.* at 4. It expresses the following conclusions about his competence and his needs:

[The resident] is not competent to either make independent and informed decisions or to give informed consent regarding matters of his residential placement, habilitation programming, finances, or treatment needs. He continues to require continual supervision, support, and training in activities of daily living.

Id. at 4.

Mr. Heaton signed the report using the title "Consulting Behavior Specialist," and Dr. Bailey also signed it.⁵ Mr. Heaton never used the title "psychologist" in the course of his work for DCFS. His contract, PX-1, refers to him as a "Behavior Specialist," and both he and DCFS used that title, or a substantially similar one, to describe his work. Respondent's Exhibits ("RX") 5, 6, 7, and 27.

There is no evidence that Mr. Heaton provides individual counseling or therapy to any of the residents of the group homes.

⁵ The copy of the report that is in evidence contains a blank signature line for Dr. Bailey. Based on the testimony at the hearing, it is clear that the version of the report proffered by the Government is a preliminary copy and that Dr. Bailey signed it at a later date. The Government does not contend that the absence of Dr. Bailey's signature on PX-3 is evidence of any violation or improper conduct by Mr. Heaton.

In addition to presenting evidence describing the scope of his work for DCFS, Mr. Heaton introduced both documentary and testimonial evidence concerning the usual practices of group homes for mentally retarded persons in furnishing psychological services to their residents. Three licensed psychologists, Dr. Rebecca Yount, Dr. Lisa Slade and Dr. Bailey testified. Each of them has extensive experience in working in group homes for mentally retarded persons in the District of Columbia. I find that each of them was a credible witness. Based upon their testimony, which was not contradicted by the Government in any way, I find that group homes have been using so-called “master’s level psychologists” to provide services to their residents for more than 10 years in the District of Columbia.⁶ Because D.C. Code § 2-3305.4(o) requires an applicant for a license to practice psychology to have a doctoral degree in psychology and at least two years of postdoctoral experience, no master’s level psychologist can be licensed in the District of Columbia.⁷

Based upon the testimony of Drs. Yount, Slade and Bailey, I find that it is extremely difficult to find licensed psychologists to provide services to the residents of group homes for mentally retarded persons. Generally, licensed psychologists do not find working with mentally retarded adults to be either financially or professionally rewarding. The practice of using master’s level psychologists in group homes has been a response to this reality.

⁶ For purposes of this opinion, a “master’s level psychologist” is a holder of a master’s degree in psychology, who may or may not be pursuing a doctorate.

⁷ As discussed below, students who are in the process of obtaining a doctorate may be eligible to practice psychology without a license in certain circumstances. 17 DCMR 6911.4, 6911.5.

The use of unlicensed master's level psychologists in group homes has been well known to both the Department of Health and the Board of Psychology, which regulates the practice of psychology in the District of Columbia pursuant to D.C. Code § 2-3302.11(b). During September and October of 1999, psychologists who work in group homes for mentally retarded persons began expressing concern over rumors that James Granger, the former Executive Director of the Office of Professional Licensing, had met with some group home providers and had expressed the view that using unlicensed master's level psychologists to provide services could result in fines. An *ad hoc* group of psychologists, led by Dr. Yount, decided to seek clarification from Mr. Granger. After a telephone conversation with Mr. Granger, Dr. Yount sent him a letter dated October 18, 1999 expressing concern about the "many quality of care, clinical, degradation of services, and financial implications" of requiring that all psychological services be provided by licensed psychologists. RX-1 at 1. The letter asked three questions:

1. Should all psychological services provided to group home residents in D.C. be provided only by a licensed psychologist?
2. Can a master's level . . . psychologist provide services under the direct supervision of a psychologist licensed in D.C.?
3. If the answer to #2 is yes, what services may these personnel provide? Examples may be assessments, development and review of behavior management plans, data collection, attendance at meetings and training.

RX-1 at 2.

Mr. Granger responded on October 21, 1999:

I have presented the issue [of practice by master's level psychologists] to the Chair of the Board of Psychology as well as the Attorney Advisor. I will be in touch to meet with you subsequent to receiving their replies. In the interim, I would not recommend any change to current practice by masters level psychologists.

RX-2.

Dr. Yount has not received any further explanation or guidance from the Board of Psychology or its Executive Director. Ms. Mebane, the inspector who issued the Notice of Infraction, also attempted to obtain guidance from the Board of Psychology on this issue, but received none. In light of Mr. Granger's statement that he "would not recommend any change to current practice by masters level psychologists," most group home providers have continued to employ master's level psychologists to work under the supervision of licensed psychologists.

III. Conclusions of Law

A. The Legal Framework

The Health Occupations Revision Act, D.C. Code § 2-3301.1, et seq. ("HORA"), establishes a unified framework for regulating the admission to, and practice of, health-related professions, including psychology. The Act identifies more than twenty health professions for which a license is required to practice within the District of Columbia, including psychology. D.C. Code § 2-3305.1. The Act also creates sixteen health occupation boards to regulate the practice of the health occupations within their respective areas of expertise. The Board of Psychology is one such board, and is authorized to "regulate the practice of psychology." D.C. Code § 2-3302.11(b). The Act prescribes certain general qualifications for all persons seeking a license to practice a health profession, D.C. Code § 2-3305.3, and contains additional qualifications for specific professions. As noted above, the qualifications for receiving a license to practice psychology include a doctoral degree in psychology and the completion of at least two years of postdoctoral experience. D.C. Code § 2-3305.4(o).

The specific provision of HORA at issue in this case is D.C. Code § 2-3305.1. It provides that “[a] license issued pursuant to this chapter is required to practice . . . psychology . . . in the District, except as provided in this chapter.” Because it is undisputed that Mr. Heaton does not have a license, the issues that must be decided are whether Mr. Heaton practiced psychology in the District of Columbia and, if so, whether any other provisions of the Act permit him to do so without a license.

B. Did Mr. Heaton Practice Psychology?

The statute defines “practice of psychology” in very broad terms:

“Practice of psychology” means [1] the application of established scientific methods and principles, including the principles of psychophysiology, learning, perception, motivation, emotions, organizational and social behaviors[,] for the purpose of understanding, assessing, treating, explaining, predicting, preventing, or influencing behavior; [2] the application of psychological methods and procedures for interviewing, counseling, psychotherapy, including behavior therapy, behavior modification, behavior medicine, or hypnotherapy; or [3] the application of psychological methods or procedures for constructing, administering or interpreting tests of intelligence, mental abilities and disorders, neuropsychological functioning, aptitudes, interests, attitudes, personality characteristics, emotions, or motivations.

D.C. Code § 2-3301.2(16)(A)⁸.

As will be seen below, the breadth of this definition creates several difficult interpretive questions. At this juncture, one thing is clear, however. The definition contains three

⁸ The definition exempts the activities of school psychologists and psychologists in academic institutions or research laboratories. D.C. Code § 2-3301.2(16)(B). Neither exemption is relevant here.

independent elements, and a person whose activities satisfy any of those elements is engaged in the practice of psychology within the meaning of this statute.

1. The First Element of the Definition

The first element of the definition is “the application of established scientific methods and principles, including the principles of psychophysiology, learning, perception, motivation, emotions, organizational and social behaviors[,] for the purpose of understanding, assessing, treating, explaining, predicting, preventing, or influencing behavior.” D.C. Code § 2-3301.2(16)(A). Interpreted broadly, this element potentially could encompass a wide range of activities that ordinarily would not be viewed as requiring a license to practice psychology. Teachers undoubtedly apply certain scientific methods and principles, including those of learning, perception and motivation, for the purpose of understanding and influencing their students’ behavior. Business managers may regularly rely upon established scientific principles of motivation, emotions, and organizational and social behavior in order to motivate employees whom they supervise. Police officers use principles of motivation and emotions in order to influence the behavior of a suspect whom they are interrogating or to de-escalate potentially dangerous confrontations on the street. To use an example closer to the facts of this case, direct care staff in group homes are expected to follow behavior management plans developed for each of the residents. In doing so, they are applying established scientific principles for the purpose of preventing or influencing behavior.

We do not expect any of the persons described above to be licensed psychologists. The rigorous standards that must be satisfied to obtain a psychologist's license caution against an overbroad interpretation of this first element of the definition. It is not likely that the Council that enacted HORA thought it was requiring teachers to have a doctorate in psychology before attempting to control students' behavior or police officers to have two years of postdoctoral experience before they could interrogate a suspect. *See* D.C. Code § 2-3305.4(o) (stating the requirements for a license to practice psychology). The first element of the definition must be interpreted in a manner consistent with that common-sense understanding, while giving effect to the Council's determination that there is some activity at the core of the "practice of psychology" for which a license is necessary in order to protect the public. *Joseph v. District of Columbia Board of Medicine*, 587 A.2d 1085, 1088 (D.C. 1991) (Protection of the public interest is the paramount concern of HORA)⁹.

The key to identifying the services for which a license to practice psychology is necessary is the function of those services and the purpose of the client or employer who seeks them. The most significant difference between a psychologist and another professional who may

⁹ The Board of Psychology has statutory authority to regulate the practice of psychology, D.C. Code § 2-3302.11(b), and is the body with initial appellate jurisdiction in this matter. D.C. Code § 6-2721. ("[A]ppeals [in civil infraction cases] involving infractions of laws governing occupations and professions . . . shall be entertained and determined by the appropriate occupational board or commission.") Any construction of the definition by the Board of Psychology, therefore, would control this case. *Cf. Morris v. District of Columbia Board of Medicine*, 701 A.2d 364, 367 (D.C. 1997) (Board of Medicine's interpretation of the statutory definition of "practice of medicine" is binding unless plainly erroneous or in conflict with the statutory language or purpose). Neither party has cited any decision of the Board of Psychology construing the definition, however. In the absence of such authoritative guidance, I will attempt to give a reasonable construction of the definition, using the ordinary tools of statutory construction, mindful of the statute's concern for protecting the public from unqualified health professionals.

employ some of the methods and principles enumerated in the first portion of D.C. Code § 2-3301.2(16)(A) is that a psychologist's *primary* function is to use those methods and principles for the purposes identified in the statute ("understanding, assessing, treating, explaining, predicting, preventing or influencing behavior"). An employer or a client hires a psychologist primarily for his or her expertise in those methods and principles. While other professionals may have knowledge about psychological principles, their primary function is not to communicate or employ that knowledge, but rather to achieve some other goal desired by their employer or client. Thus, a school hires a teacher to instruct students, an employer hires a manager to run a portion of its business, and a police department hires an officer to protect citizens from criminals. In all of those instances, the non-psychologists' use of some of the methods and principles enumerated in the definition for one of the statutorily identified purposes is a means to some other end for which they were hired. By contrast, clients and employers hire a psychologist primarily to make use of the psychologist's expertise in the enumerated methods and principles. They seek that very expertise, not some other service for which knowledge of psychological principles may be a helpful component.¹⁰

In evaluating the services that Mr. Heaton provides for DCFS, therefore, the touchstone must be his primary function in performing those services. If he primarily uses the methods and

¹⁰ The focus on the expertise sought by an employer distinguishes a group home's direct care staff from its psychologists. Direct care staff members are not employed as professionals to exercise independent professional judgment about psychological matters; instead, they implement behavioral and habilitation plans developed by others. See 22 DCMR 3599.1 (Direct care staff members "render the day-to-day personal assistance residents require in order to meet the goals of their individual habilitation plans"). See also *DOH v. Community Multi-Services*, OAH No. I-00-40136, Findings of Fact, Conclusions of Law and Final Order, August 29, 2000 at 17-20 (Direct care staff do not provide "professional services" within the meaning of 22 DCMR 3520.1 and 3520.3.)

principles described in the statute for one or more of the purposes identified therein, then he is practicing psychology in his work for DCFS. On the other hand, if his use of those methods and principles is incidental or secondary to the purpose for which DCFS hired him, his services do not constitute the practice of psychology.¹¹

The evidence establishes that the primary purpose of Mr. Heaton's services at DCFS was to provide expertise in matters included within the first element of the definition of "practice of psychology." The conclusions in PX-3 about the resident's competence and degree of retardation demonstrate that Mr. Heaton used his expertise in various scientific principles for the purpose of "understanding, assessing, treating, explaining, . . . or influencing [the resident's] behavior." D.C. Code § 2-3301.2(16)(A). In writing the report, Mr. Heaton did not use his psychological training and expertise as a means to some other end sought by DCFS. Instead, DCFS commissioned him to prepare the report primarily for the purpose of obtaining an evaluation by someone who possessed training and expertise in scientific methods and principles helpful in understanding and assessing human behavior. Indeed, Mr. Heaton gave the title "Psychological Evaluation Update" to his report and wrote that the report provided "an updated *psychological* assessment as a component in the development of [the resident's] annual Individual Habilitation Plan." PX-3 at 1. (emphasis added). The words of the report itself show a purpose to provide psychological insights and leave no doubt that Mr. Heaton satisfied the first element of the statutory definition of "practice of psychology" when he prepared PX-3.

¹¹ In some cases, there may not be a clearly defined line between the "primary" function served by an employee or an independent contractor and his "incidental" or "secondary" functions. In this case, however, there is a sufficient demarcation. At this time, therefore, it is unnecessary to consider the difficulties that may be presented in other cases in which the line may be less clear.

Some of the services called for in Mr. Heaton's contract with DCFS (PX-1) also satisfy the first element of the definition of "practice of psychology." The contract calls for him to perform "[a]nnual assessments and updates as needed," PX-1 at 2, and those assessments are psychological assessments similar to PX-3. Mr. Heaton was hired to perform such assessments precisely because of his training and experience in applying scientific principles for one or more of the purposes identified in the first element of the definition. That work, therefore, constitutes the practice of psychology, as defined by the first portion of D.C. Code § 2-3301.2 (16) (A). Similarly, the preparation of behavior treatment plans, the compiling of quarterly notes modifying such plans and in-service training given to staff members about the implementation of such plans all involve the use of Mr. Heaton's training and expertise in applying scientific principles and methods in order to influence behavior. Those tasks, therefore, also satisfy the first element of the definition of "practice of psychology."¹²

2. The Second Element of the Definition

The second element of the definition is satisfied if a person applies "psychological methods and procedures for interviewing, counseling, psychotherapy, including behavior therapy, behavior modification, behavior medicine, or hypnotherapy." D.C. Code § 2-3301.2 (16) (A). Mr. Heaton does not dispute that he applies "psychological methods and procedures"

¹² Some of the services called for by Mr. Heaton's contract do not satisfy this element or any of the other elements of the definition. Absent evidence of what transpired at the meetings he attended, there is no basis for holding that such attendance satisfied any of the elements of the definition. Similarly, there is no evidentiary basis for holding that membership on the Human Rights Committee satisfied any of the elements of the definition. In addition, the Government does not contend that the simple recording of Mr. Heaton's observations of residents' behavior called for by the contract satisfies any element of the definition.

in his work for DCFS.¹³ The more difficult question is whether he does so for any of the purposes enumerated in the second element of the definition. The evidence clearly establishes that Mr. Heaton does not engage in a number of the activities mentioned in this portion of the definition. He does not engage in counseling, psychotherapy, behavior medicine or hypnotherapy.¹⁴ The remaining two activities - interviewing and behavior modification - present closer questions.

a. Interviewing

As with the first element of the definition, a narrowing construction of “interviewing” is necessary in order to avoid unreasonable results. For example, a reporter might use “psychological methods” for interviewing a reluctant news source, just as a lawyer or investigator might employ such methods in interviewing an unwilling witness. A reasonable person, however, would not expect that those activities require a license to practice psychology. The well-accepted doctrine of statutory construction known as *noscitur a sociis* (literally “it is known from its associates”) is a useful aid in understanding the type of “interviewing” for which a psychologist’s license is necessary. That doctrine provides:

If the legislative intent or meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their relationship with other

¹³ Mr. Heaton’s concession on this point makes it unnecessary to grapple with the difficulties inherent in using the term “psychological” to define “practice of psychology.”

¹⁴ A preliminary question presented by the statutory language is whether the entire statutory phrase “including behavior therapy, behavior modification, behavior medicine, or hypnotherapy” modifies “psychotherapy,” thereby indicating that all of those terms are examples of psychotherapy. The grammatical structure of this portion of the definition does not support such an interpretation, because there is no “or” in front of “psychotherapy,” as would be expected if “psychotherapy” were the last word in the series. Thus, I have interpreted “behavior therapy” to be the only example of psychotherapy included in the definition. The outcome of this case would not be different, however, if the other terms also were interpreted to be examples of psychotherapy.

associated words and phrases [A] word may be defined by an accompanying word and ordinarily the coupling of words denotes an intention that they should be understood in the same general sense.

2A N. Singer, *Sutherland's Statutory Construction*, § 47:16 (6th ed. 2000). *See Gutierrez v. Ada*, 120 S. Ct. 740, 744 (2000); *District of Columbia v. Estate of Parsons*, 590 A.2d 133, 136-37 (D.C. 1991).

The statutory term “interviewing” is followed immediately by two additional terms that also refer to conversations – “counseling” and “psychotherapy.” Counseling or psychotherapy sessions are specialized conversations between a client and a professional in which the client hopes to derive some therapeutic benefit from the conversation itself. This suggests a reasonable limitation for the broad statutory term “interviewing,” *i.e.*, a question and answer process in which a participant being questioned by a professional expects that the conversation itself will result in some therapeutic benefit.

Although Mr. Heaton has interviewed residents of DCFS’s group homes in the course of conducting assessments of them, there is no evidence that these interactions satisfy this narrow definition of “interviewing,” even if he employs psychological methods and procedures during these conversations. He interacts with the residents to gather data to present in a report or to use in creating a behavior management plan or an individual habilitation plan. The interaction itself is not intended to have a therapeutic effect, although the information that Mr. Heaton gains from the interaction ultimately may lead to psychological benefits for the resident through the efforts

of others at a later date. Mr. Heaton, therefore, does not engage in “interviewing” within the meaning of the second element of the definition of “practice of psychology.”

b. Behavior Modification

It is undisputed that Mr. Heaton prepares behavior management plans for various residents of DCFS’s facilities. The direct care staff implements those plans, which seek to correct maladaptive behaviors that a resident may exhibit. While the question is close, I do not believe that Mr. Heaton’s preparation of such plans constitutes “behavior modification” within the meaning of the statute. The doctrine of *noscitur a sociis* also is useful in interpreting the broad statutory term “behavior modification.” Each of the other activities identified in this portion of the statute, *i.e.*, interviewing, counseling, psychotherapy, behavior medicine or hypnotherapy, involves a direct one-to-one relationship between a professional and a client from which the client derives a therapeutic benefit. Thus, “behavior modification” as used in the second element of the definition should have a similar scope, and should be limited to professional efforts in a one-to-one setting aimed at changing a client’s behavior. Mr. Heaton’s preparation of a behavior management plan, however, does not occur during the course of a one-to-one relationship. It takes place outside the presence of the resident, and the resident derives benefits only if others implement Mr. Heaton’s plan later. Accordingly, Mr. Heaton does not engage in behavior modification as contemplated by the second element of the definition.¹⁵

¹⁵ This conclusion does not negate my previous conclusion that Mr. Heaton’s preparation of behavior management plans satisfies the first element of the definition. *See pp. 11-15 supra.*

Thus, although Mr. Heaton concedes that he applies psychological methods and procedures in his work, he does not do so in the course of conducting any of the activities enumerated in the second element of the definition of “practice of psychology.” Accordingly, he does not satisfy that portion of the definition.

3. The Third Element of the Definition

The third element of the definition of “practice of psychology” presents fewer interpretative difficulties. It is satisfied by the “application of psychological methods or procedures for constructing, administering or interpreting tests of intelligence, mental abilities and disorders, neuropsychological functioning, aptitudes, interests, attitudes, personality characteristics, emotions, or motivations.” D.C. Code § 2-3301.2(16)(A). Mr. Heaton readily admitted that he uses his training in psychology to administer and interpret various psychological tests. PX-3 shows that he administered and interpreted at least two such tests to evaluate a resident’s cognitive functioning and adaptive skills. Because such tests measured the resident’s “mental abilities and disorders” and “aptitudes,” Mr. Heaton’s administration and interpretation of them satisfy this portion of the definition of “practice of psychology.”

C. Possible Exemptions

Mr. Heaton’s activities satisfy two of the three alternative elements of the definition of “practice of psychology.” This does not end the inquiry, however. Several statutory and

regulatory provisions provide exemptions from the licensing requirements, and Mr. Heaton argues that one or more of those exemptions cover him.¹⁶

1. D.C. Code § 2-3301.3(d)

The first exemption is found in D.C. Code § 2-3301.3(d), which provides:

Nothing in this chapter shall be construed to require licensure for or to otherwise regulate, restrict, or prohibit individuals from engaging in the practices, services, or activities set forth in the paragraphs of this subsection if the individuals do not hold themselves out, by title, description of services, or otherwise, to be practicing any of the health occupations regulated by this chapter. Nothing in this subsection shall be construed as exempting any of the following categories from other applicable laws and regulations of the District or federal government:

- (1) Any minister, priest, rabbi, officer, or agent of any religious body or any practitioner of any religious belief engaging in prayer or any other religious practice or nursing practiced solely in accordance with the religious tenets of any church for the purpose of fostering the physical, mental, or spiritual well-being of any person;
- (2) Any person engaged in the care of a friend or member of the family, including the domestic administration of family remedies, or the care of the sick by domestic servants, housekeepers, companions or household aids [*sic*] of any type, whether employed regularly or because of an emergency or illness, or other volunteers;
- (3) Any individual engaged in the lawful practice of audiology, speech pathology, X-ray technology, laboratory technology, or respiratory therapy;
- (4) An orthotist or prosthetist engaged in fitting, making, or applying splints or other orthotic or prosthetic devices;

¹⁶ One exemption that clearly is not available to Mr. Heaton in this case can be found at 17 DCMR 6911.1 and 6911.2, which allows, in certain circumstances, students enrolled in a doctoral program to practice psychology under the supervision of a licensed psychologist, psychiatrist or independent clinical social worker. The exemption is available, however, only if the student and the student's supervisor inform the Board of Psychology in writing of certain basic information about the student's practice within two weeks of the start of that practice. 17 DCMR 6911.4, 6911.5. Neither Mr. Heaton nor his supervisor filed the required information with the Board.

- (5) Any individual engaged in the practice of cosmetology, the practice of nontherapeutic massage, or the operation of a health club;
- (6) Any individual engaged in the commercial sale or fitting of shoes or foot appliances; or
- (7) Marriage and family therapists, marriage counselors, art therapists, drama therapists, attorneys, or other professionals working within the standards and ethics of their respective professions.

Mr. Heaton contends that this exemption applies to him because he did not “hold [himself] out, by title, description of services, or otherwise” to be practicing psychology. Although the Government argues that Mr. Heaton *did* hold himself out as a psychologist by the description of services in his contract and otherwise, I do not need to reach this issue. Mr. Heaton has misconstrued § 2-3301.3(d) as a general permission for anyone to engage in a regulated health profession as long as that person does not himself or herself out as practicing that profession. The scope of the exemption is much narrower, however. It allows individuals to engage in “the practices, services, or activities set forth in the paragraphs of this subsection,” *i.e.*, the specific activities described in the seven numbered paragraphs in subsection 2-3301.3(d). Mr. Heaton does not contend that his activities are covered by any of those numbered paragraphs, and, therefore, § 2-3301.3(d) does not exempt him from the requirement that he be licensed.

2. D.C. Code § 2-3310.3(q)

Mr. Heaton cites D.C. Code § 2-3310.3(q) to make a related argument. That section provides: “[u]nless authorized to practice psychology under this chapter, a person shall not use the words or terms ‘psychology,’ ‘psychologist,’ or similar title or description of services with

the intent to represent that the person practices psychology.” Mr. Heaton argues that neither he nor anyone else at DCFS used the term “psychologist” to describe his work and, in any event, he never had the intent to represent that he practiced psychology. That argument is unavailing as well. Section 2-3310.3(q) provides that use of the identified terms by an unlicensed person is itself a violation, regardless of the services actually performed by the violator. Thus, it is a violation of § 2-3310.3 for an unlicensed person to call herself a “psychologist” regardless of whether the services she offers actually meet the definition of “practice of psychology.” Section 2-3310.3, therefore, creates a separate violation focused upon the words used and the intent of the violator. By contrast, the section of the D.C. Code under which Mr. Heaton is accused – § 2-3305.1 – forbids unlicensed practice of psychology and focuses upon the services provided by the violator, regardless of the terms used to describe those services or the intent of the service provider. Thus, compliance with § 2-3310.3 is not a defense to a charge of violating § 2-3305.1

3. 22 DCMR 3521.12

Mr. Heaton also relies upon 22 DCMR 3521.12, a regulation applicable to group homes for mentally retarded persons. That section requires each group home to “ensure that behavior management programs and reviews for residents are designed by a behavior management specialist, a psychologist or psychiatrist.” The regulations define “behavior management specialist as “a person who has training and experience in the theory and technique of changing the behavior of individuals to enhance their learning of life skills, adaptive behaviors, and to decrease maladaptive behaviors; and [who] works under the supervision of a licensed practitioner, usually a psychologist.” 22 DCMR 3599.1. The Government stipulated that Mr. Heaton’s training and experience are sufficient to meet the definition of “behavior management

specialist,” and, as noted above, he works under the supervision of a licensed psychologist. The Government contends, however, that § 3521.12 is inapplicable because Mr. Heaton’s activities are broader than those permitted by the regulation.

To decide whether § 3521.12 provides a “safe harbor” for any or all of Mr. Heaton’s activities, there are three subsidiary questions that must be answered: 1) whether a regulation such as § 3521.12 may negate HORA’s statutory mandate that a person who practices psychology must be licensed; 2) whether applicable federal regulations require that psychologists licensed under District of Columbia law must provide the services that Mr. Heaton has been providing; and 3) whether the evidence establishes that Mr. Heaton’s activities that satisfy the definition of “practice of psychology” also are activities that § 3521.12 permits behavior management specialists to perform. I address each issue below.

a. The Relationship between § 3521.12 and HORA

At the outset, § 3521.12’s authorization of unlicensed behavior management specialists to perform certain tasks presents a purely legal question: if a statute requires an individual to possess a license to practice psychology in order to engage in certain activities, can a regulation adopted by an agency nevertheless authorize someone to engage in those activities without a license? In the particular circumstances of this case, the answer is yes.¹⁷

¹⁷ Ordinarily, the answer would be no, as an agency “is a creature of statute and may not act in excess of its statutory authority.” *District Intown Properties, Ltd. v. District of Columbia Department of Consumer and Regulatory Affairs*, 680 A.2d 1373, 1379 (D.C. 1996); *See also Spring Valley Wesley Hts. Citizens Ass’n v. District of Columbia Bd. of Zoning Adjustment*, 644

There are two principal reasons for this conclusion. First, no party to this matter takes the position that § 3521.12 is invalid. Mr. Heaton expressly relies upon the rule, and the Government, while asserting that it “takes no position on the validity” of § 3521.12, Gov’t Br. at 11, also asserts that the rule “does not conflict with the statutory provision” requiring a license to practice psychology, and also concedes that “[t]here is no known legal authority in existence that authorizes the Department of Health to prosecute a civil infraction against someone engaging in activities authorized by the Department’s own rules”. *Id.* Thus, no one has asked me to hold that § 3521.12 is invalid.

Second, HORA itself provides that it does not “limit the right of an individual to practice any other profession that he or she is authorized to practice under the laws of the District.” D.C. Code § 2-3301.3(a). Two different provisions of District of Columbia law address the promulgation of rules governing the operation of group homes for mentally retarded persons. Both the Mentally Retarded Citizens Constitutional Rights and Dignity Act of 1978, D.C. Code § 6-1964(c), and the Health-Care and Community Residence Facility, Hospice and Home Care Licensure Act of 1983, D.C. Code § 32-1304(a)(3) expressly authorize the promulgation of standards governing group homes for mentally retarded persons, including rules concerning habilitation and care of residents and staffing of such facilities. Sections 3521.12 and 3599.1 are such statutorily-authorized standards. Those regulations recognize the profession of behavior management specialist and define its duties and qualifications. As a result of that express

A.2d 434, 436-37 (D.C. 1994); *Doe v. Gates*, 981 F.2d 1316, 1320-21 (D.C. Cir. 1993); *Fiorentino v. United States*, 607 F.2d 963 (Ct. Cl. 1979).

authorization, § 2-3301.3(a) permits behavior management specialists to perform the specified services in group homes even though they do not have a license issued pursuant to HORA.

b. The Impact of Federal Medicaid Regulations

At the hearing, the Government expressed concern that allowing an unlicensed psychologist to provide psychological services to group home residents could result in a violation of federal Medicaid standards. In certain instances, those standards require providers of professional services in intermediate care facilities for the mentally retarded, such as the DCFS facilities where Mr. Heaton provides services, to have a valid state license.

There are two applicable federal regulations on point. The first, 42 C.F.R. § 483.410(b), requires a facility to “be in compliance with all applicable provisions of Federal, State and local laws, regulations and codes pertaining to health, safety and sanitation.”¹⁸ That section does not impose any independent licensing requirement, but simply requires compliance with any existing health, safety or sanitation regulations that might require a license. Thus, if 22 DCMR 3521.12 authorizes Mr. Heaton to perform services for DCFS even though he does not possess a psychologist’s license, his performance of those services would not violate § 483.410(b).

¹⁸ The definition of “State” in the Medicaid regulations includes the District of Columbia. 42 C.F.R. § 400.203. Within the District of Columbia, the Department of Health is the “Medicaid agency” as defined in that section.

The second applicable federal regulation is 42 C.F.R. § 483.430(b)(5), which specifically addresses professional services rendered to residents of intermediate care facilities for the mentally retarded. That section provides:

Professional program staff must be licensed, certified, or registered, as applicable, to provide professional services by the State in which he or she practices. Those professional program staff who do not fall under the jurisdiction of State licensure, certification, or registration requirements specified in § 483.410(b), must meet the following qualifications:

. . .

(v) To be designated as a psychologist, an individual must have at least a master's degree in psychology from an accredited school.

This regulation requires professional program staff to be licensed only to the extent that state law otherwise requires, and establishes minimum standards for those professionals who are not subject to state licensing requirements. A behavior management specialist who performs the tasks listed in § 3521.12 does not “fall under the jurisdiction” of the District of Columbia’s licensing requirements for psychologists. Therefore, § 483.430(b)(5) does not require such a person to be licensed. The regulation does set a minimum standard for a psychologist who is not subject to licensing requirements, requiring that he or she have at least a master’s degree. Because Mr. Heaton satisfies that requirement, a ruling that § 3521.12 authorizes his work at DCFS would not result in any violation of § 483.430(b)(5).¹⁹

¹⁹ Mr. Heaton might argue that he does not need to satisfy § 483.430(b)(5)(v) because his title at DCFS is “behavior specialist,” not “psychologist.” Because he complies with the rule, I do not need to decide whether that rule applies only to those who use the title “psychologist” or whether it extends to anyone who performs the functions of a psychologist, regardless of that person’s job title.

Thus, if District of Columbia law permits Mr. Heaton to provide services without possessing a psychologist's license, the federal Medicaid regulations do not stand in the way.

c. Are Mr. Heaton's Services Authorized by § 3521.12?

The remaining question is whether Mr. Heaton's practice of psychology is authorized by § 3521.12. That section states: "Each [group home for mentally retarded persons] shall ensure that behavior management programs and reviews for residents are designed by a behavior management specialist, a psychologist or a psychiatrist." Three terms in that rule – "behavior management programs," "reviews," and "designed" require further discussion.

Although the phrase "behavior management programs" is not defined in the regulations, the definition of the related term "behavior management specialist" gives sufficient guidance as to its meaning. The regulations define a "behavior management specialist" as "a person who has training and experience in the theory and technique of changing the behavior of individuals to enhance their learning of life skills, [and] adaptive behaviors and to decrease maladaptive behaviors" 35 DCMR 3599.1. It follows that "behavior management programs" as used in § 3521.12 are plans for changing an individual's behavior to enhance the learning of life skills and adaptive behaviors and to decrease maladaptive behaviors.

Section 3521.12 also permits behavior management specialists to design "reviews" for residents. Accepted dictionary meanings of "review" include: a "critical evaluation," *Meriam-*

Webster Collegiate Dictionary, (available at www.m-w.com); an “inspection or examination for purpose of evaluation,” *American Heritage Dictionary of the English Language*, 3rd ed, 1996 (available at www.dictionary.com); or an “examination with a view to amendment or improvement; revision.” *Webster’s Revised Unabridged Dictionary* (1998) (available at www.dictionary.com). Thus, “reviews” as used in § 3521.12 include examinations or evaluations undertaken to revise or improve something. Section § 3521.12, however, fails to answer the critical question: reviews of what?

Other portions of 22 DCMR provide the answer. Every resident admitted to a group home for mentally retarded persons must receive an Individual Habilitation Plan (“IHP”). 22 DCMR 3517.10. *See also* D.C. Code §§ 6-1922(b) and 6-1943. Such a plan must include appropriate intermediate and long-term habilitation goals for the resident, and a statement of both the methods for achieving those goals and the means for determining whether the goals are being achieved. D.C. Code § 6-1943(c). “Habilitation” in turn is defined as “the process by which a person is assisted to acquire and maintain those life skills which enable him or her to cope more effectively with the demands of his or her own person and of his or her own environment and to raise the level of his or her physical, intellectual, social, emotional and economic efficiency.” D.C. Code § 6-1902(14).²⁰

²⁰ There is a close relationship between behavior management programs and IHPs. A behavior management program, which is a plan for helping a resident to learn life skills and to avoid maladaptive behavior, can satisfy the statutory requirement that an IHP include “a statement of, and an explanation for, the plan of habilitation designed to achieve [the] intermediate and long-range goals.” D.C. Code § 6-1943(c)(3).

Section 3521 of 22 DCMR sets detailed standards for IHPs, and requires periodic updates of those plans. For example, 22 DCMR 3521.4 provides:

Each [group home] shall monitor *and review* each resident's Individual Habilitation Plan on an ongoing basis to ensure participation of the resident and appropriate [group home] staff in revision of such Plans whenever necessary. The schedule for the reviews shall be documented within each IHP. (Emphasis added.)

In addition, 22 DCMR 3521.6 requires that each resident must be reevaluated and must receive an updated IHP at least annually.

The regulations requiring periodic updates and reviews of IHPs are part of the same section of the regulations as § 3521.12. It is reasonable, therefore, to construe the “reviews” authorized by § 3521.12 to refer to the process of reviewing, updating and revising IHPs that is mandated by §§ 3521.4 and 3521.6. A behavior management specialist, therefore, may design any of the reviews or evaluations referred to in those sections, along with behavior management programs.

The remaining interpretive question concerns the term “designed.” The dictionary defines “design” to include “[t]o create or execute in an artistic or highly skilled manner,” *American Heritage Dictionary of the English Language*, 3rd ed., 1996 (available at www.dictionary.com) or “to create, fashion, execute or construct according to plan: devise, contrive,” *Merriam Webster Collegiate Dictionary*, (available at www.m-w.com). Thus, the act of designing reviews or behavior management plans is more than simply planning for such

activities to take place or merely writing the words that will appear in a document. “Designed” as used in the regulation denotes the act of creating a behavior management program or a review. The design process extends to the exercise of professional judgment in acquiring, analyzing and reporting information, as well as in recommending a course of conduct. Section 3521.12, therefore, authorizes behavior management specialists to exercise such judgment (under supervision) in the formulation of behavior management programs and the evaluative reviews called for in other portions of § 3521.

With the above understanding of the meaning of “behavior management programs”, “reviews,” and “designed”, it is now possible to decide whether any or all of Mr. Heaton’s activities that fall within the definition of “practice of psychology” also fall within § 3521.12’s safe harbor. I first will consider PX-3, Mr. Heaton’s “Psychological Evaluation Update” of a resident. The report itself unequivocally asserts that it is “a component in the development of [the resident’s] annual Individual Habilitation Plan.” PX-3 at 1. Mr. Heaton’s use of the phrase “annual Individual Habilitation Plan” is a clear reference to § 3521.6’s requirement that IHPs be “updated appropriately, at least annually.” PX-3, therefore, is a review required by § 3521 and § 3521.12 authorized him to create it.

Mr. Heaton administered two psychological tests in the course of conducting the evaluation reported in PX-3, and that testing forms an independent basis for concluding that he practiced psychology. *See* p.19 *supra*. Consequently, it is necessary to decide whether § 3521.12 permits behavior management specialists to perform such testing. I hold that it does. It

is readily apparent that a regulatory directive to reevaluate and to update an IHP necessarily will require appropriate testing. The results of psychological tests can provide valuable information about the resident's level of functioning that will be helpful in planning what services he or she may require, or may no longer need. Consequently, § 3521.12's safe harbor extends to Mr. Heaton's administration and interpretation of the tests. There are two important caveats to this holding, however. First, § 3521.12 is not a blanket authorization for a behavior management specialist to administer any psychological test whatsoever. The evidence must demonstrate, as it does here, that the tests are performed to provide information for the authorized design of a periodic review or a behavior management plan. Second, § 3521.12 mandates that a behavior management specialist be appropriately supervised, and a supervisor must consider whether the behavior management specialist has the necessary training and experience to administer the test. Here, it is undisputed that Mr. Heaton was qualified to administer the tests at issue. Absent such safeguards, a behavior management specialist's administration or interpretation of psychological tests could fall outside § 3521.12's safe harbor, subjecting him or her to liability for unlicensed practice of psychology.

Therefore, although PX-3 shows that Mr. Heaton practiced psychology, § 3521.12 authorized him to create that report. Consequently, he did not need a license to practice psychology to do so.

As discussed above, *see* p.15 *supra*, some of the duties identified in Mr. Heaton's contract, PX-1, fall within the definition of "practice of psychology." Specifically, the

contractual provisions that mandate “Annual assessments and updates as needed”, “Quarterly notes as needed,” “Testing and evaluations as needed”, “Inservice trainings as needed,” and “Behavior Treatment Plan,” PX-1 at 2, all satisfy one of the elements of the statutory definition. The evidence establishes, however, that each of those duties also is authorized by § 3521.12.

Most of the contractual categories refer to the creation of reviews or behavior management plans within the meaning of § 3521.12. I already have found that “Annual assessments and updates as needed” refers to reports that are similar to PX-3, *i.e.*, regular reviews and updates of an IHP required by 22 DCMR 3521.4 and 3521.6. *See* p. 15 *supra*. Similarly, Mr. Heaton’s preparation of “Behavior Treatment Plan[s]” is authorized by § 3521.12, which permits a behavior management specialist to prepare behavior management plans. Mr. Heaton’s behavior treatment plans are “behavior management programs” within the meaning of § 3521.12 because they recommend measures that will assist residents in overcoming maladaptive behaviors and in maintaining appropriate behaviors. The “Quarterly notes as needed” category refers to the updating and revision of IHPs. It therefore qualifies as a “review” that § 3521.12 authorizes Mr. Heaton to perform.

Another of Mr. Heaton’s contractual duties is “Testing and evaluations as needed.” There is no evidence that the “evaluations” are dissimilar to the evaluation reflected in PX-3, which, as noted above, is an evaluation authorized by § 3521.12. Nor is there any evidence in the record that Mr. Heaton conducts testing for any purpose other than creating an IHP update or other review authorized by § 3521.12. Thus, the “Testing and evaluations” that he performs pursuant to his contract do not require a license.

Finally, the evidence shows that Mr. Heaton provides in-service training to direct care staff in order to explain how to implement the behavior treatment plans that he has designed. Such training is part of the process of designing a behavior management program. Creating an effective program for a resident requires more than simply writing words on paper. The design of such a program must include efforts to ensure that those responsible for the day-to-day supervision of the resident know what to do. It would be irrational to interpret the “design” of a behavior treatment program to exclude giving instructions to the staff, leaving them to guess at how to implement it. The author of the plan undoubtedly is the best person to train the staff in how the plan should function. Such training, therefore, is part of the “design” of a behavior management program and is authorized by § 3521.12.²¹

Accordingly, all of Mr. Heaton’s contractual duties that satisfy the definition of “practice of psychology” also are tasks that § 3521.12 permits a behavior management specialist to perform and he does not need a license to practice psychology in order to conduct those activities.

²¹ Alternatively, the regulations require that “[e]ach professional service provider shall assist, as appropriate, each other person who is working with a resident in the [group home] that relevant professional instructions can be implemented throughout the resident’s programs and daily activities.” 22 DCMR 3520.6. That section requires Mr. Heaton to assist direct care staff in understanding and implementing the plans that the regulations authorize him to design. Section 3520.6, therefore, is an independent source of authority for Mr. Heaton to train the staff. As with § 3521.12, that express authorization means that the statutory requirement for a license is inapplicable. D.C. Code § 2-3301.3(a).

It is important to recognize that these conclusions of law do not authorize unlicensed psychologists to provide any conceivable service to group home residents. This opinion is a limited one, addressing only the interplay between the broad statutory definition of “practice of psychology” and the narrow regulatory safe harbor created by § 3521.12. This opinion concludes only that persons who qualify as “behavior management specialists” as defined in § 3599.1 may offer only those services that are authorized by § 3521.12. Non-qualified persons who provide services that meet the definition of “practice of psychology”, or behavior management specialists who engage in activities outside the scope of § 3521.12, are subject to liability for practicing psychology without a license.

D. The Record Concerning Good Faith

Because the above findings of fact and conclusions of law establish that Mr. Heaton did not violate D.C. Code § 2-3305.1, no fine may be imposed. Ordinarily, that would make discussion of Mr. Heaton’s *bona fides* irrelevant, as there is no need to consider whether and to what extent a fine should be mitigated. Mr. Heaton, however, may some day face a licensing board, either in the District of Columbia or elsewhere, and that board might consider the circumstances of this case in evaluating Mr. Heaton’s character and fitness for a license. To the extent that any such board may deem this administrative court’s views to be helpful, it should be made clear that the record shows that Mr. Heaton acted in good faith, in accordance with the advice that psychologists working in group homes received from the Office of Professional Licensing’s executive director at the time.

The ruling in favor of Mr. Heaton should not be interpreted in any way as a criticism of Ms. Mebane for issuing the Notice of Infraction in this case. She was rightly concerned about the unclear state of the law on this issue, and brought this case so that the Department of Health and group home providers might have guidance on the nature and extent of the services that master's level psychologists may provide to group home residents.²²

V. Order

Based upon the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2001:

ORDERED, that Mr. Heaton did not violate D.C. Code § 2-3305.1 and Notice of Infraction 00-40058 is **DISMISSED**.

/s/ **1/24/01**

John P. Dean
Administrative Judge

²² Of course, the Department of Health and/or the Board of Psychology are free to address these issues in subsequent rulemakings and, if they believe it appropriate, to change the licensing requirements.